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IN THE COURT OF APPEALS OF INDIANA

RAVEN BELT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 24A01-0601-CR-17
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0312-FC-794

July 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Raven Belt ("Belt") brings this consolidated appeal following his convictions in two trials for three counts of Child Molesting, as Class C felonies,[1] and his pleas of guilty to two counts of Sexual Battery, as Class D felonies.[2] We affirm the convictions but revise the sentence.

Issues

Belt presents four issues for review:

I. Whether he was entitled to a change of venue from Franklin County due to excessive pretrial publicity;

II. Whether the trial court abused its discretion by denying his motion to withdraw his pleas of guilty to two counts against him;

III. Whether the verdicts reached in the second trial should have been set aside due to juror misconduct; and

IV. Whether his sentence is inappropriate.

Facts and Procedural History

On December 5, 2003, Belt was a substitute teacher for a class of second grade students at Laurel Elementary School in Franklin County, Indiana. In the course of the school day, Belt fondled H.E., C.B., and R.B. He fondled J.S. twice.

On December 17, 2003, the State charged Belt with five counts of Child Molesting, as Class C felonies. On June 18, 2005, Belt sent a letter to the trial court, requesting a speedy trial and a change of venue "to a non-conjoining county" for a reason "available upon

[1] Ind. Code § 35-42-4-3.
[2] Ind. Code § 35-42-4-8.

request." (App. 30.) The trial court granted the motion for a speedy trial, but denied the motion for a change of venue.

On August 29 and 30, 2005, Belt was tried before a jury on the charge relating to H.E. Belt was found guilty as charged. Belt's second trial, on charges relating to J.S., was scheduled to commence immediately following the first trial. Before the conduct of voir dire in the second trial, Belt renewed his motion for a change of venue. After a hearing, the trial court denied Belt's motion for a change of venue. On August 31, 2005, the day the second trial was to commence, Belt presented a newspaper article about the case published that day. The trial court asked jurors if they had read any such article after their selection, and the jurors responded negatively. Belt's second trial continued, and he was found guilty as charged.

Subsequent to the second trial, the State moved to amend the remaining two counts of Child Molesting, as Class C felonies, to two counts of Sexual Battery, as Class D felonies. Belt entered pleas of guilty to the amended charges, and the trial court took the pleas under advisement and scheduled the matter for sentencing.

On September 13, 2005, Belt filed a notice of withdrawal of guilty pleas, to which the State objected. The trial court denied Belt leave to withdraw his pleas. On September 14, 2005, Belt moved for a change of venue from the county. On September 22, 2005, Belt filed a motion to set aside the jury's verdict and for mistrial. After a hearing conducted on October 12, 2005, the trial court denied the motions.

On December 2, 2005, Belt was sentenced to eight years each for two of the Class C felony convictions, three years for one of the Class C felony convictions, and three years for each of the Class D felony convictions. All sentences were consecutive, with the exception of the three-year Class C felony conviction, providing for an aggregate sentence of twenty-two years. Belt now appeals.

Discussion and Decision

I. Change of Venue

Belt contends that he was improperly denied a change of venue from Franklin County because there was pervasive pretrial publicity such that some jurors had already formed opinions.

A defendant has a Sixth Amendment right to an impartial jury. Ward v. State, 810 N.E.2d 1042, 1048 (Ind. 2004), cert. denied, 126 S. Ct. 395 (2005). We review a trial court's denial of a motion for change of venue for an abuse of discretion. Id. However, an abuse of discretion does not occur where voir dire reveals that the seated panel was able to set aside preconceived ideas of guilt and render a verdict that is based solely on the evidence. Id.

The defendant has the burden of demonstrating the existence of two distinct elements: (1) prejudicial pretrial publicity and (2) the inability of jurors to render an impartial verdict. Id. Prejudicial pretrial publicity contains inflammatory material that would be inadmissible at the defendant's trial or contains misstatements or distortions of the evidence given at trial. Id. The jurors need not be totally ignorant of the facts involved; rather, the critical inquiry is whether overall community bias and prejudice exist such that the defendant was denied a fair

trial. See id. Exposure to pretrial publicity will not establish prejudice unless the defendant is able to show that the jurors were unable to render a verdict based on the evidence. Id.

In this case, Belt made no showing of pretrial publicity and ensuing prejudice. At the commencement of voir dire at his second trial, Belt offered an article from the Brookville American newspaper discussing the case. He renewed his motion for a change of venue, which was denied. On the next day, he offered an article published that same morning, revealing the verdict reached at the first trial. Belt has identified no misstatement, distortion, or inadmissible prejudicial information in either of the articles. Significantly, the jurors denied exposure to any newspaper articles published since their selection as jurors, and there is absolutely no evidence of record that any juror had been affected by pretrial publicity. As such, Belt has not demonstrated that he was denied a fair trial in the community due to adverse pretrial publicity.

II. Motion to Withdraw Guilty Plea

Belt contends that the withdrawal of his guilty pleas is necessary to correct a manifest injustice. Indiana Code Section 35-35-1-4(b) sets forth the applicable standard when a defendant pleads guilty pursuant to an agreement with the State and then requests to withdraw the plea:

> After entry of a plea of guilty ..., but before imposition of sentence, the court may allow the defendant by motion to withdraw his plea ... for any fair and just reason unless the state has been substantially prejudiced by reliance upon the defendant's plea. The motion to withdraw the plea of guilty or guilty but mentally ill at the time of the crime made under this subsection shall be in writing and verified. The motion shall state facts in support of the relief demanded, and the state may file counter-affidavits in opposition to the motion. The ruling of the court on the motion shall be reviewable on appeal

> only for an abuse of discretion. However, the court shall allow the defendant to withdraw his plea ... whenever the defendant proves that withdrawal of the plea is necessary to correct a manifest injustice.

Our appellate courts have interpreted this statute to require a trial court to grant such a request only when the defendant proves that withdrawal of the plea "is necessary to correct a manifest injustice." Turner v. State, 843 N.E.2d 937, 940 (Ind. Ct. App. 2006) (quoting Weatherford v. State, 697 N.E.2d 32, 34 (Ind. 1998), reh'g denied). The court must deny a motion to withdraw a guilty plea if the withdrawal would result in substantial prejudice to the State. Id.

"Manifest injustice" and "substantial prejudice" are necessarily imprecise standards, and an appellant seeking to overturn a trial court's decision has faced a high hurdle under the current statute and its predecessors. Id. On appeal, the trial court's ruling on a motion to withdraw a guilty plea is presumed to be correct. Id. at 941. Therefore, one who appeals an adverse decision on a motion to withdraw must prove the trial court abused its discretion by a preponderance of the evidence. Id. We will not disturb the court's ruling where it was based on conflicting evidence. Id.

When, as here, the defendant fails to submit a written and verified motion to withdraw a guilty plea,[3] the issue of wrongful denial is generally waived. See Carter v. State, 739 N.E.2d 126, 128, n.3 (Ind. 2000). Moreover, Belt has failed to develop on appeal a cogent argument with reference to relevant portions of the record.

[3] Belt submitted a written, but unverified, pleading captioned "Notice of Court of Withdrawal of Guilty Pleas." (App. 178.)

In support of his motion for withdrawal, Belt initially claimed to the trial court that he had "discovered new witnesses and facts that provide a fair and just reason to allow the defendant to withdraw his guilty pleas." (App. 182.) He has apparently abandoned this claim on appeal, and merely refers to his own testimony at the sentencing hearing, wherein he maintained his innocence and, when cross-examined regarding the guilty pleas, claimed that he was confused and did not understand his attorney's advice. His sentencing hearing testimony was not before the trial court when the motion to withdraw guilty pleas was denied. Belt has failed to demonstrate that the trial court abused its discretion by refusing to grant a withdrawal to correct a manifest injustice.

III. Juror Misconduct

Belt claims that the verdicts reached in the second trial, involving offenses against J.S., should have been set aside due to juror misconduct that was discovered after the trial. A defendant who is seeking a new trial because of juror misconduct must show (1) that the misconduct was gross and (2) the misconduct probably harmed the defendant. Griffin v. State, 754 N.E.2d 899, 901 (Ind. 2001). We will review the trial court's determination thereon for an abuse of discretion, with the burden on the appellant to show that the misconduct meets the prerequisites for a new trial. Id.

To meet his burden, Belt offered the testimony of his family members, who allegedly witnessed a juror and the father of J.S. exchange smiles. Assuming the truth of this assertion, we are not persuaded that this rises to the level of gross misconduct.

Belt additionally elicited the testimony of a juror in the second trial. The juror testified that he believed Belt to be innocent, but was in the minority, and decided to capitulate to the "majority rule." (App. 1121.) As a general rule, a jury's verdict may not be impeached by the testimony of the jurors who returned it. Shanabarger v. State, 846 N.E.2d 702, 708 (Ind. Ct. App. 2006), trans. denied. Permitting such evidence "could defeat the jury's solemn acts under oath, open the door to post-trial jury tampering, and allow dissatisfied jurors to destroy a verdict after assenting." Griffin, 754 N.E.2d at 902. An exception exists when the defendant demonstrates that the jury was exposed to improper, extrinsic material and there is a substantial possibility of prejudice. Id. at 708-9.

Indiana Evidence Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify (1) to drug or alcohol use by any juror, (2) on the question of whether extraneous prejudicial information was improperly brought to the jury's attention or (3) whether any outside influence was improperly brought to bear upon any juror. A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

Here, the juror denied that there was an "outside communication" from "any outside source." (App. 1122.) To the extent that he was willing to reveal his own internal deliberative processes, it was not properly admissible to impeach the verdict. As such, the trial court did not abuse its discretion by refusing to set aside the jury verdict.

IV. Sentence

At the time of Belt's offenses, Indiana Code Section 35-50-2-6 provided that a person who committed a Class C felony should be imprisoned for a fixed term of four (4) years, with not more than four (4) years added for aggravating circumstances and not more than two (2) years subtracted for mitigating circumstances. Indiana Code Section 35-50-2-7 provided that a person who committed a Class D felony should be imprisoned for a fixed term of one and one-half years, with not more than one and one-half years added for aggravating circumstances and not more than one (1) year subtracted for mitigating circumstances. The trial court found that Belt violated his position of trust and imposed upon him maximum and consecutive sentences for Counts I, II, III, and V. A concurrent sentence was imposed for Count IV. The sentencing order is silent with respect to any mitigators.

Belt argues that his aggregate twenty-two-year sentence is inappropriate in light of the nature of the offenses and his character. In particular, he points out that he had no prior criminal history and served in the military.[4]

"[S]ubject to the legal parameters, sentencing determinations are generally within the discretion of the trial court." Estes v. State, 827 N.E.2d 27, 29 (Ind. 2005). In some circumstances, however, we will revise a sentence that is authorized by statute. Indiana

[4] Belt also makes a cursory argument that his consecutive sentences are excessive because Indiana Code Section 35-50-2-1.3 "imposes a separate and distinct limitation on the trial court's ability to deviate from the advisory sentence for any sentence running consecutively." Appellant's Brief at 17. At the time of Belt's offenses, this statute had not yet been enacted, and affords him no relief. It has since been amended, effective July 1, 2007, and appears to clarify the intention of the legislature that the statue applies only to consecutive sentences imposed for non-violent felony convictions resulting from one episode of criminal conduct. As of July 1, 2007, the statute will include a new subsection (d): "This section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode

Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The nature of the offenses is that Belt used his position as a substitute teacher to gain access to his victims. However, we agree with Belt that his lack of criminal history is a significant mitigating circumstance.

Under the presumptive sentencing scheme, our General Assembly determined that the presumptive sentence was meant to be the starting point selected as an appropriate sentence for the crime committed. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. Additionally, the General Assembly determined that a defendant's lack of criminal history is so significant that trial courts "shall" consider it when determining what sentence to impose. I.C. § 35-38-1-7.1(a); Asher v. State, 790 N.E.2d 567, 572 (Ind. Ct. App. 2003). The statute appropriately encouraged leniency towards defendants who have not previously been through the criminal justice system. Id. The lack of criminal history together with the violation of a position of trust lead us to conclude that the relevant sentencing considerations are in equipoise and the presumptive sentence is appropriate.

Accordingly, we revise Belt's maximum sentences on Counts I and III from eight years each to four years each, and revise his maximum sentences on Counts II and V from three years each to one and one-half years each, providing for an aggregate sentence of eleven years. We find the order for consecutive sentences appropriate. Our Indiana Supreme

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of criminal conduct." 2007 Ind. Legis. Serv. 178 (West). Indiana Code Section 35-50-1-2(10) includes Child Molesting as a crime of violence.

Court has observed that, in such instances, "consecutive sentences seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003). We direct the trial court on remand to enter a revised sentencing order in accordance with this opinion.

Affirmed in part; reversed in part; remanded with instructions.

SHARPNACK, J., and MAY, J., concur.